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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 72-1739

GERALD A. SCHROEDER and CLARA JOHNSON SCHROEDER,

Petitioners,

vs.

TRUSTEES OF SCHOOLS OF TOWNSHIP 42 NORTH, RANGE 11, EAST OF THE THIRD PRINCIPAL MERIDIAN, COOK COUNTY, ILLINOIS, and BOARD OF EDUCATION, SCHOOL DISTRICT NO. 57, COOK COUNTY, ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, SECOND DIVISION

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INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Constitutional and statutory provisions involved	3
Statement of the case	5
Reasons for granting writ	8
Conclusions	21
Appendix	a

CITATIONS

Cases:

American Electrolyte v. Kerschbaum, 105 F. 2d 764, 70 App.D.C. 241

Bankers Trust Co. v. Pacific Employees Ins.Co., 282 F.2d 106 (9th Cir. 1960) cert.den. 368 U.S. 882, 82 S.Ct. 41, L.Ed.2d 27 (1961)

Brown v. U.S., 39 F.Supp. 82

Chambers v. B.&O. R.Co., 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907)

Countee v. U.S. 112 F.2d 447 (1940)

Donovan v. Dallas, 337 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964)

Kelly v. Bowman, 104 F.Supp. 973 (E.D. Ill. 1952)

Lawlor v. National Screen Service, 349 U.S. 322, 326, 75 S.Ct. 8

Premier Electrical Constr. Co. v. Miller-Davis, et al., 442 F.2d 1132 (1970)

Rankin v. Florida, 418 F.2d 489 (1969) cert.den. 397 U.S. 1039, 90 S.Ct. 1358 25 L.Ed.2d 650

Schroeder v. State of Illinois, 354 F.2d 561

Superior Oil Co. v. Harsh, 39 F.Supp 467 (1941) aff'd. 7th Cir. 126 F.2d 572
Younger v. Harris, 401 U.S. 37 at 43-44, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)
Adams v. Pearson, 411 Ill. 431, 104 N.E. 2d 207 (1952)
City of Waukegan v. Stanczak, 6 Ill. 594 129 N.E.2d 751 at 757 (1955)
Eberhardt, 15 Ill.App. 54 (1884)
Hoffman v. Hoffman, 330 Ill. 413, 161 N.E. 723
Kendrick v. City of St. Paul, et al., 213 Minn. 283, 6 N.W.2d 449
Mattion v. Trustees of Schools, Twp. 41, 2 Ill.App.2d 135, 279 N.E.2d 66 (1971)
Memphis v. Dean, 8 Wall 64, 19 L.Ed. 326
Miller v. Commissioners of Lincoln Park, 278 Ill. 400, 116 N.E. 176 (1917)
Miner v. Yantis, 102 N.E.2d 524 (1951)
People ex rel. White v. Busenhart, 29 Ill.2d 156, 193 N.E.2d 850
Riggs v. Johnson County, 6 Wall 166 (1868)
Schroeder v. Busenhart, 80 Ill.App.2d 431, 225 N.E.2d 702
Trustees of Schools v. Schroeder, 23 Ill.2d 74, 177 N.E.2d 178
Trustees of Schools v. Schroeder, 25 Ill. 2d 289, 184 N.E.2d 872
Trustees of Schools v. Schroeder, Wahler et al. v. Schroeder, et al., 2 Ill.App.2d, 1009, 278 N.E.2d 431

Miscellaneous:

Constitution of the United States, Amendment I
Constitution of the United States, Amendment XIV
Illinois Constitution, Article VI, Sec. 8
28 U.S.C., Sec. 1257

Ill.Rev.Stat., Chap. 110, Sec. 41
American Bar Association, Section on Local Government Law, Committee on Condemnation and Condemnation Procedure, 1964 Report of Committee, "Nature of Interest Taken," 24-27

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PETITION FOR WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT, SECOND DIVISION.

The petitioners, Gerald A. Schroeder and Clara Johnson Schroeder, respectfully pray that a writ of certiorari issue to review that part of the judgment and opinion of the Appellate Court of the State of Illinois, First District, Second Division, entered in this proceeding on October 24, 1972, which affirmed the order of the trial court enjoining petitioners from pursuing

further litigation and denying them leave to file a counter-complaint.

OPINION BELOW

The opinion of the Appellate Court of the State of Illinois, not yet reported, appears in the Appendix hereto. No opinion was rendered by the Illinois Supreme Court in denying the petition for leave to appeal.

JURISDICTION

The judgment of the Appellate Court of the State of Illinois was entered October 24, 1972. No petition for rehearing was filed. A timely petition for leave to appeal was filed in the Supreme Court of Illinois. This petition was denied on March 27, 1973, and this petition for certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257.

QUESTIONS PRESENTED

I. WHETHER AN INJUNCTION AGAINST "INSTITUTING OR PROSECUTING ANY PROCEEDINGS, LEGAL, EQUITABLE OR OTHERWISE,...AFFECTING TITLE IN CERTAIN REAL ESTATE VIOLATES CONSTITUTIONAL SAFEGUARDS IN THAT IT PREVENTS ACCESS TO THE COURTS AND COUNSEL, DENIES DUE PROCESS AND EQUAL PROTECTION OF THE LAWS, VIOLATES PRIVILEGES AND IMMUNITIES OF UNITED STATES CITIZENSHIP, INVADES THE RIGHT OF FREE SPEECH, AND VIOLATES PUBLIC POLICY BY CLOSING ACCESS TO THE COURTS.

II. WHETHER IT IS AN UNCONSTITUTIONAL DEPRIVATION OF DUE PROCESS OF LAW TO BAR A COUNTERCOMPLAINT RAISING A PREVIOUSLY UNDECIDED ISSUE, IN A CAUSE OF ACTION INITIATED BY THE PARTY CLAIMING THE PROTECTION OF RES JUDICATA.

III. WHETHER REFERENCE TO A MASTER IN CHANCERY THREE YEARS AFTER PASSAGE OF THE ILLINOIS CONSTITUTION JUDICIAL AMENDMENT ABOLISHING MASTERS IN CHANCERY, ALMOST TWO YEARS AFTER SAID AMENDMENT BECAME EFFECTIVE, EIGHTEEN DAYS PRIOR TO THE DATE THAT THE ILLINOIS SUPREME COURT FINALLY ABOLISHED THE TERM OF THE CHANCELLOR, AND WITH ONLY BRIEF TESTIMONY TAKEN TWO DAYS BEFORE THE "FINAL" EXPIRATION OF THE TERM OF THE CHANCELLOR, WITH A JUDGMENT (INCLUDING THE MASTER IN CHANCERY'S FEES) BASED UPON THE MASTER'S HEARINGS AND REPORTS OVER A PERIOD OF THREE YEARS FOLLOWING THE SUPPOSED "FINAL" EXPIRATION OF THE MASTER'S TERM AND ALMOST SIX YEARS AFTER THE PASSAGE OF THE JUDICIAL AMENDMENT, COMBINED WITH THE DEATH OF THE SITTING JUDGE WHO HAD HEARD AND CONSIDERED ALL PROCEEDINGS IN A CASE OVER A PERIOD OF SOME THREE YEARS, AND HAD MADE A TENTATIVE DECISION BASED UPON SUCH MASTER'S REPORTS, FOLLOWED BY A SUCCESSOR JUDGE ENTERING "AN ACT IN FORMAL FULFILLMENT" OF THE JUDICIAL DETERMINATIONS OF THE DECEASED JUDGE WITHOUT INDEPENDENT DETERMINATION, VIOLATES FEDERAL DUE PROCESS RIGHTS.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting t he free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Constitution of the United States, Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive a person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Illinois Revised Statutes, Chapter 110, Section 41:

"Allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleadings, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial."

STATEMENT OF THE CASE

This was a suit by plaintiffs, the trustees of schools of a township, and the board of education of a school district, against Gerald A. Schroeder and his wife, Clara, to restrain allegedly vexatious and harassing litigation and recover damages therefor. The cause was referred to a Master in Chancery. After approving his first report, the trial court entered a decree by which defendants were permanently enjoined from instituting any proceedings for the purpose of affecting title to real estate which had been the subject of a prior condemnation.

Basically, the history of this litigation began in 1959, when the township school trustees initiated condemnation of the Schroeders' farm and market. Following the jury verdict, there was a successful motion for a new trial by the school trustees, and th- Schroeders successfully appealed from that post-trial order and were eventually awarded judgment on the jury verdict. Trustees of Schools v. Schroeder, 23 Ill.2d 74, 177 N.E.2d 178. The Schroeders then appealed the denial of their traverse by the trial judge in the condemnation suit, and their attorneys raised only one of the many issues which the Schroeders had ordered them to present, brief, and argue. The appeal was decided adversely to the Schroeders. Trustees of Schools v. Schroeder, 25 Ill.2d 289, 184 N.E.2d 872.

In a later lawsuit by their original attorneys for fees, the Schroeders defended by alleging that the attorneys had been specifically requested to raise on appeal the theory that the eminent domain provisions of the 1959 State of Illinois School Code authorized the taking of no greater estate than a "fee simple determinable." Trustees of Schools v. Schroeder, Wahler, et al. v. Schroeder, et al., 2 Ill.App.3d 1009, 278 N.E.2d 431. However, an attempt to raise this issue, along with other issues, was denied on grounds of estoppel. People ex rel. White v. Busenhart, 29 Ill. 2d 156, 193 N.E.2d 850. Similar attempts in the federal courts, including attempts at federal civil rights charges, were unsuccessful as a collateral attack, Schroeder v. State of Illinois, 354 F.2d 561, as was another state court lawsuit charging conspiracy. Schroeder v. Busenhart, 80 Ill.App. 2d 431, 225 N.E.2d 702. The latter attempt resulted in a substantial judgment for attorneys' fees against the Schroeders under Section 41 of the Civil Practice Act of the State of Illinois. Smith-Hurd Annotated, Ch. 110.

In November, 1964, the Trustees of Schools then initiated the present action by a "complaint in chancery for injunction and other relief." The complaint did not allege that any further litigation was initiated or about to be initiated by the Schroeders, but merely stated that "under the circumstances, plaintiffs ought to be granted a permanent writ of injunction...," and requested compensation for costs, attorneys' fees, and expenses incurred in defending all litigation except for the first two appeals. After the trial court granted

the injunction, based on the first report of the Master in Chancery, the defendants moved to vacate the decree and for leave to file a counterclaim. The motion was denied. Then, the cause was re-referred to the Master to hear evidence and determine damages which the plaintiffs were entitled to recover from defendants "(f)or their attorneys' fees, expenses and costs incurred..." in the litigation in which defendants engaged after affirmance of the condemnation judgment. The Master found and reported to the court that plaintiffs were entitled to recover from defendants the sum of $23,930.00 in attorneys' fees and $614.21 in expenses. After hearing and overruling exceptions to the report, the trial court entered a judgment that awarded plaintiffs damages in the sum of $24,544.21.

The Appellate Court herein reversed the decision of the trial court, based upon the report of the Master in Chancery, for attorneys' fees and damages. The Appellate Court herein, however, upheld the injunction and upheld the refusal of the trial court to allow the defendants to file a counterclaim, which rulings are the subject of this appeal.

The Supreme Court of the State of Illinois denied the petition for leave to appeal.

REASONS FOR GRANTING THE WRIT

I. AN INJUNCTION AGAINST "INSTITUTING OR PROSECUTING ANY PROCEEDINGS, LEGAL, EQUITABLE OR OTHERWISE,...AFFECTING TITLE" IN CERTAIN REAL ESTATE VIOLATES CONSTITUTIONAL SAFEGUARDS IN THAT IT PREVENTS ACCESS TO THE COURTS AND COUNSEL, DENIES DUE PROCESS AND EQUAL PROTECTION OF THE LAWS, VIOLATES PRIVILEGES AND IMMUNITIES OF UNITED STATES CITIZENSHIP, INVADES THE RIGHT OF FREE SPEECH, AND VIOLATES PUBLIC POLICY BY CLOSING ACCESS TO THE COURTS.

An injunction against litigation is a drastic remedy, since it purports on its face to preclude a citizen from access to those very institutions of the nation which are designed for settling disputes, namely, the courts. Thus, the policy reasons against such prior "censorship" or prior restraint are even stronger than the policy reasons preventing prior censorship in free speech and related cases. As an early Illinois case phrased it, an injunction against litigation causes "injury wholly remedyless at law." Eberhardt, 15 Ill.App. 54, 1884. Petitioners seek review in this Court of the decision of the Appellate Court of the State of Illinois affirming the trial court order which permanently enjoined petitioners against instituting or prosecuting any proceedings, legal, equitable or otherwise, which would affect title to a particular parcel of real estate. Petitioners feel that this decision should be reviewed because its effect is to deprive them of access to courts and counsel, one of the privileges and immunities of United States citizenship, to deny them equal protection of the laws, and to subject them to loss of very valuable property without adequate due process of law.

A. The case of Chambers v. B.&O.R.Co., 207 U.S. 142, 28 Sup.Ct. 34, 52 L.Ed. 143 (1907), firmly establishes that ready access to judicial tribunals is one of the privileges and immunities of United States citizenship secured and preserved for all Americans by the Fourteenth Amendment to the United States Constitution. The injunction issued in the present case completely deprives petitioners of access to the courts for determination of an as yet unresolved issue which vitally affects their lives. As such, courts of the State of Illinois have imposed a sanction against the petitioners which deprives them of one of the privileges and immunities of United States citizenship.

In the Chambers case, the courts stated that the right of ready access to courts of law, 207 U.S. 142 at 148,

> "is the right conservative of all of the rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship...."

In the American system, it is intended that courts of law will always be available to provide an alternative to the use of force and physical power as a means of solving problems. In the present case, however, that alternative has been forever withdrawn from the petitioners.

This extraordinary and unlawful deprivation of personal and civil rights occurred in spite of the fact that there were clear, compelling reasons to deny the injunction. In the first place, the petitioners did not initiate the litigation which gave rise to the order - the respondents did. If the

respondents were so concerned that they would be made a party to vexatious and harassing litigation, it would have been a simple matter to seek relief by counter-claim in the event they were sued by the petitioners.

B. The real injustice and perhaps the most compelling reason to grant the writ of certiorari is that the injunction permanently bars the petitioners from litigating an issue which has never been decided by any court in spite of the lengthy proceedings between the parties herein.

As the Schroeders have repeatedly maintained, a long train of cases all recognize the proposition in Illinois law that taking of land by eminent domain and condemnation grants only a determinable fee, easement, or the minimum estate necessary for the public purpose, unless the condemnation statute expressly grants the power to condemn in fee simple absolute. Kelly v. Bowman, 104 F.Supp. 973 (E.D.Ill. 1952); City of Waukegan v. Stanczak, 6 Ill. 594, 129 N.E.2d 751 at 757 (1955); Miller v. Commissioners of Lincoln Park, 278 Ill. 400, 116 N.E. 178 (1917); Superior Oil Co. v. Harsh, 39 F.Supp. 467 (1941) aff'd 7th Cir., 126 F.2d 572; Miner v. Yantis, 410 Ill. 401, 102 N.E.2d 524 (1951); and most recently, Mattion v. Trustees of Schools Township 41, 2 Ill.App.2d 135, 279 N.E.2d 66 (1971); cf. Kendrick v. City of St. Paul, et al., 213 Minn. 283, 6 N.W.2d 449; but see dicta to the contrary, Trustees of Schools, et al., v. Schroeder, et al, 2 Ill.App.2d 1009, 278 N.E.2d 431 (1971).

These cases reiterate the proposition that condemnation cannot acquire fee simple

unless the statute specifically so authorizes. Miner and Mattion both take note of the fact that condemnation has a distinctive rule in this regard but find on the facts of their cases that the school acquired title by warranty deed and by grant and therefore the fee simple determinable provisions of condemnation cases do not apply. The Stanczak case finds that as the school system was a city school under a special city charter granted by the State, the city and therefore the school had power to condemn in fee simple absolute.

Of course, the familiar rule of law that in condemnation a lesser interest if taken than fee simple is the subject of frequent and extensive litigation. For numerous representative cases from many jurisdictions, see American Bar Association, Section on Local Government Law, Committee on Condemnation and Condemnation Procedure, 1964 Report of Committee, "Nature of Interest Taken," 24-27.

Both the trial court and the appellate court herein decided against the Schroeders because they held that the issue of "fee simple determinable" in condemnation raised by the counterclaim were barred by res judicata. The history of this litigation and the case law in Illinois make it abundantly clear that the issues framed by the counter-complaint have not previously been litigated and could properly be asserted by counterclaim.

The original condemnation court order indicated only that a "fee simple" interest was acquired, and it does not specify whether the interest was absolute or determinable. This clarification of the nature and

duration of the estate taken has never been ruled on substantatively, either at the trial or the appellate level.

The injunction prevents any possibility of receiving a judicial determination of this issue. Unless and until this issue is finally determined, it will remain a fact that the land was taken from the petitioners without complete due process of law. This is particularly true in light of the fact that the entire body of case laws interpreting Illinois statutory provisions indicates that, in fact, the land should revert to the petitioners.

C. Furthermore, the injunction was granted in contravention of all well-established rules of equity. In Younger v. Harris, 401 U.S. 37, at 43-44, 91 Sup.Ct., 746, 27 L.Ed.2d 669 (1971), the court stated that the

> "basic doctrine of equity jurisprudence (is) that courts of equity should not act ...when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."

Under Ill.Rev.Stat., Chap. 110, Sec. 41, respondents have an adequate legal remedy if anyone brings a suit against them solely to vex and harass them. That particular statutory provision provides

> "allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by

the court at the trial."

This is certainly an adequate legal remedy. The Younger case indicates that equitable relief should not lie in this case.

The Schroeder injunction met none of the familiar fundamental and elementary rules of injunction prerequisites: there was no showing whatever of any imminent or immediate threat of the Schroeders filing further lawsuits; there was no allegation or showing of any sort that the injury would be irreparable (it is difficult to imagine any irreparable injury that can be inflicted upon a school board by filing a lawsuit against it); and, finally, the remedies at law here were many and complete.

The combination of lack of imminent harm and lack of irreparable injury makes especially forceful the United States Supreme Court caution that

> "an injunction is premature if founded upon a contingency" Memphis v. Dean, 8 Wall 64, 19 L.Ed 326,

and dramatically exposes the trial court denial of due process to the Schroeders.

D. Moreover, the injunction order prohibits the petitioners, under a possible contempt penalty, from litigating any matters pertaining to their land in the federal courts as well as the state court. Such invasion of the authority of the federal court has long been disapproved. In the case of Riggs v. Johnson County, 6 Wall 166 (1868), it was stated that

"it is obvious that the injunction of a state court is inoperative to control, or in any manner to affect the process of proceedings of a circuit court (federal), not on account of any paramount jurisdiction in the latter courts, but because, in their sphere of action, circuit courts are wholly independent of any state tribunal."

The petitioners contend that the state court is without power to enjoin prospective suits in the federal courts. Donovan v. Dallas, 377 U.S. 408, 84 Sup.Ct. 1579, 12 L. Ed.2d 409 (1964), so holds. In fact, Donovan indicates that even when litigation reaches the point of being vexatious and harassing and even when the doctrine of res judicata may bar further proceedings, the state court does not have the authority to enjoin federal court action. And, of course, numerous cases hold that a second lawsuit on a different legal theory is prima facie not vexatious. American Electrolyte v. Kerschbaum, 105 F.2d 764, 70 App.D.C. 241.

E. On a more profound level, however, an injunction against litigation is fundamentally against public policy. Not only is closing the door to the courts an invitation to litigants to take their case to the streets, but to restrain for the indefinite future an individual from pursuing a grievance is to foreclose a cause of action perhaps as yet unknown. The law has advanced through the creation of new issues and through the ingenuity of litigants in rephrasing old questions in ways appealing to the judges of the future. Res judicata is a harsh rule, and one with subtle overtones; collateral estoppel is likewise a doctrine of many subtleties. A

wide catalog of issues in civil rights, segregation, equal protection, rights of privacy, rights of persons accused of crime, and dozens of modern legal issues could have been prohibited from being raised in past courts by blanket injunctive prohibitions against future litigation such as the one attempted herein.

To require a prospective litigant to first undergo the burden of setting aside an injunction order before he may litigate is not only to reverse the burden of proof but to discourage attorneys from representing him and to prejudice in advance his cause of action.

* * * * *

The court herein ordered that the Schroeders:

> "...are hereby permanently and perpetually enjoined and restrained from instituting or prosecuting any proceedings, legal, equitable, or otherwise...or in any proceedings ancillary or supplemental thereto affecting title in the premises described...." (C. 226.)

This overly broad and sweeping prohibition against litigation barring causes of action as yet unknown is totally unsupported by any allegation of permanent injury, is completely unidentified with any irreparable harm, and has any conceivable damage completely remediable in law. Such a decree can only serve to hinder the public policy of free access to the courts, restrain settlement of disputes by litigation, and restrict the development of the common law by legal growth through the adversary process.

II. IT IS AN UNCONSTITUTIONAL DEPRIVATION OF DUE PROCESS OF LAW TO BAR A COUNTER-COMPLAINT RAISING A PREVIOUSLY UNDECIDED ISSUE, IN A CAUSE OF ACTION INITIATED BY THE PARTY CLAIMING THE PROTECTION OF RES JUDICATA.

As the statement of facts indicates, this suit was initiated by respondents. The petitioners sought to raise by counterclaim the issue of the nature and extent of fee condemned by the municipality. The trial court denied leave to file the counterclaim, citing the doctrine of res judicata as a bar to the filing of said claim. The petitioners contend that the doctrine of res judicata does not serve as a bar to the counterclaim, that the court therefore abused its discretion in denying leave to file this counterclaim in light of the fact that the resolution of that one single issue would be determinative of critically important property rights, and that such an abuse constituted a denial of due process of law to the petitioners.

The trial court failed to recognize the distinction between res judicata and collateral estoppel. Where a subsequent litigation is upon a different claim or cause of action, a prior determination is conclusive, or res judicata, only as to the issues and questions which were actually litigated and determined therein and not as to matters which might have been litigated and determined in the former action. Lawlor v. National Screen Service, 349 U.S. 322, 326, 75 S.Ct. 865, 99 L.Ed. 1122 (1959); Rankin v. Florida, 418 F.2d 489 (1969), Cert.Den., 397 U.S. 1039, 90 S. Ct. 1358, 25 L.Ed2d 650.

Because of the fact that a party should not be faced with a constant threat of a

lawsuit, the doctrine of collateral estoppel supplements the doctrine of res judicata, in that it bars issues and questions which could have been raised in a prior action, regardless of whether or not they were in fact raised. However when, as here, the "protected party" initiates a subsequent action involving other issues, the policy considerations are entirely different. When this occurs, the underlying concern is uniformity, certainty, and consistency of any decisions which may be reached, as well as reaching complete justice between the parties. Thus, only the doctrine of res judicata would be applicable in the present case. Hoffman v. Hoffman, 330 Ill. 413, 161 N.E. 723. In the present case, the nature and extent of the fee interest has never been litigated or ruled upon, and it should have been allowed in the counterclaim. Adams v. Pearson, 411 Ill. 431, 104 N.E.2d 207 (1952).

The federal courts have repeatedly recognized that due process is applicable notwithstanding res judicata, for even though the same circumstances and transactions may give rise to two cases, entirely different facts (and issues) are essential to maintaining each. Scoggin v. Schrunk, 344 F.Supp. 463, 469 (1971). Here there is more than

> "one right of the plaintiff and one wrong by the defendant involving that right...." Bankers Trust Co. v. Pacific Employees Ins. Co., 282 F.2d 106 (9th Cir. 1960), cert.den. 368 U.S. 822, 82 S.Ct. 41, 7 L.Ed.2d 27 (1961)

Moreover, numerous federal court cases have allowed what would appear to be an actual review of an adjudicated state case for the

purpose of clarifying and interpreting the final decision rendered. Countee v. U.S., 112 F.2d 447 (1940); Brown v. U.S., 39 F. Supp. 82; and Premier Electrical Construction Company v. Miller-Davis Company, et al. 422 F.2d 1132 (1970).

In light of the foregoing authority, the trial court should have allowed the petitioners to file a counterclaim. The failure of the court to do so constitutes deprivation of due process of law. The petitioners are in a position where they have no legal process available to them to claim their reversionary interest in their land. That they have a reversionary interest is clear under the holding of Kelley v. Bowman, 104 F.Supp. 973 (E.D.Ill., 1952). That case stated that a school district in Illinois receives only a determinable fee, and that when the condemned land is abandoned as a school site, the reversionary interest vests in the successors to title.

The result of the trial court action, then, is to deny the petitioners access to the only legal proceeding in which they can assert their claim, and this is a clear deprivation of due process in violation of the Fourteenth Amendment.

III. REFERENCE TO A MASTER IN CHANCERY THREE YEARS AFTER PASSAGE OF THE ILLINOIS CONSTITUTION JUDICIAL AMENDMENT ABOLISHING MASTERS IN CHANCERY, ALMOST TWO YEARS AFTER SAID AMENDMENT BECAME EFFECTIVE, EIGHTEEN DAYS PRIOR TO THE DATE THAT THE ILLINOIS SUPREME COURT FINALLY ABOLISHED THE TERM OF THE CHANCELLOR, AND WITH ONLY BRIEF TESTIMONY TAKEN TWO DAYS BEFORE THE "FINAL" EXPIRATION OF THE TERM OF THE CHANCELLOR, WITH A JUDGMENT (INCLUDING THE MASTER IN CHANCERY'S FEES) BASED UPON THE MASTER'S HEARINGS AND REPORTS OVER A PERIOD OF THREE YEARS FOLLOWING THE SUPPOSED "FINAL" EXPIRATION OF THE MASTER'S TERM AND ALMOST SIX YEARS AFTER THE PASSAGE OF THE JUDICIAL AMENDMENT, COMBINED WITH THE DEATH OF THE SITTING JUDGE WHO HAD HEARD AND CONSIDERED ALL PROCEEDINGS IN A CASE OVER A PERIOD OF SOME THREE YEARS, AND HAD MADE A TENTATIVE DECISION BASED UPON SUCH MASTER'S REPORT, FOLLOWED BY A SUCCESSOR JUDGE ENTERING "AN ACT IN FORMAL FULFILLMENT" OF THE JUDICIAL DETERMINATIONS OF THE DECEASED JUDGE WITHOUT INDEPENDENT DETERMINATION, VIOLATES FEDERAL DUE PROCESS RIGHTS.

The judicial amendment to the Illinois Constitution was approved by the voters on November 6, 1962, and was effective January 1, 1964. It recited that

> "there shall be no masters in chancery or other fee officers in the judicial system.: Article VI, Sec. 8.)

The implementation schedule of that amendment provided that the masters in chancery in office on the effective date

> "shall be continued as masters in chancery ...until the expiration of their terms, and may thereafter by order of court,

wherever justice requires, conclude matters in which testimony has been received."

On November 8, 1965, the Court entered a brief order denying the motion to dismiss and referring the case to the named Master in Chancery, with the following curious explanation:

"With respect to said motion of plaintiff to strike certain portions of defendants' amended answer in view of the circumstances that there will be no masters in chancery after December 3, 1965 and that as a practical matter no references to masters can be made after November 26, 1965, and in order to put this case at issue so it can be promptly referred to a master, it is hereby ordered that said motion to strike be and the same is hereby denied." (C.164)

Accordingly, a brief hearing was held before the Master on December 1, 1965, which was referred to in a later hearing as "he wanted to get in under the gun on your hearings so he put him on cross examination." (Report of Proceedings before Master Ambrose P. Finn, March 8, 1966. P. 60)

The record in this case is replete with a conscious avoidance of the mandate of the electorate in amending the Illinois Constitution, and the Rules of the Illinois Supreme Court implementing this amendment.

It further is respectfully submitted that a judge cannot merely be a "rubber stamp" for another judge, but due process requires that the successor must exercise at least some minimal independent awareness and decision on the controversy before him.

CONCLUSIONS

The foregoing amply demonstrates that the decision of the Appellate Court herein denies the defendants their constitutional rights in failing to authorize the filing of a counterclaim and in upholding the injunction herein.

The legitimate counterclaim of the Schroeders, seeking clarification of the "fee simple" judgment, whether absolute or determinable, was wrongfully denied by the trial and Appellate courts.

On the merits of the injunction, enjoining "any proceedings...ancillary or supplemental thereto...." is an overly broad and sweeping prohibition against citizens' access to the courts, and includes the prohibition of raising federal issues, including federal constitutional issues, in the state courts. The two lawsuits filed by the Schroeders which the plaintiffs allege as vexatious were on entirely different causes of action than the original condemnation and the appeal of its award and traverse, and raised legitimate new issues. There was absolutely no showing of any intention by the Schroeders to file a further lawsuit, no showing of imminent injury, no showing of irreparable harm, and in fact the damages at law were fully adequate. Such attempts at prior restraint and discouraging of counsel can only restrict the full public access to and confidence in the courts.

For all of these reasons, the case should be reversed and summary judgment be entered for the defendants, or, in the

alternative, the case remanded for proper trial on the issues with full, fair safeguards and fully in compliance with the letter and spirit of the Constitution and statutes.

Respectfully submitted,

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APPENDIX

No. 55877 Not yet reported.

TRUSTEES OF SCHOOLS OF TOWNSHIP 42 NORTH, RANGE 11, EAST OF THE THIRD PRINCIPAL MERIDIAN, COOK COUNTY, ILLINOIS and BOARD OF EDUCATION, SCHOOL DISTRICT 57, COOK COUNTY, ILLINOIS,	)	APPEAL FROM CIRCUIT COURT COOK COUNTY
Plaintiffs-Appellees,	)	_____
v.	)	
GERALD A SCHROEDER and CLARA JOHNSON SCHROEDER,	)	HONORABLE WALKER BUTLER, PRESIDING.
Defendants-Appellants.	)	

MR. JUSTICE LEIGHTON delivered the opinion of the Court.

This was a suit by plaintiffs, trustees of schools of a township and the board of education of a school district, against Gerald Schroeder and his wife Clara to restrain vexatious and harassing litigation and recover damages therefor. The cause was referred to a Master in Chancery. After approving his first report, the trial court entered a decree which found that following affirmance of a condemnation judgment by the Supreme Court, defendants had engaged in vexatious and harassing litigation with plaintiffs. Defendants were permanently enjoined from instituting any proceeding for the purpose of affecting the verdict

and judgment entered in the condemnation case. The long and bitter history of the litigious controversy that formed the factual base for the decree is recounted in Schroeder v. Busenhart, 80 Ill.App.2d 431, 225 N.E.2d 702. We will not repeat it here.

Thereafter, defendants moved to vacate the decree and for leave to file a counterclaim. The motion was denied. Then, the cause was re-referred to the Master to hear evidence and determine damages which plaintiffs were entitled to recover from defendants "(f)or their attorneys' fees, expenses and costs incurred***" in the litigation in which defendants engaged after affirmance of the condemnation judgment. Evidence heard by the Master consisted of testimony by the lawyers who represented plaintiffs in the litigation. This testimony was supported by law office time records and entries of disbursements for expenses. Proof was made that plaintiffs, as billed by the lawyers, paid the attorneys' fees and the expenses. Neither the testimony of the lawyers nor their supporting evidence was controverted by defendants. The Master found and reported to the court that plaintiffs were entitled to recover from the defendants the sum of $23,930 in attorneys' fees and $614.21 in expenses. After hearing and overruling exceptions to the report, the trial court entered a judgment that awarded plaintiffs damages in the sum of $24,544.21.

In this appeal defendants present several issues. We will decide only two. 1. Whether the defendants were denied constitutional rights (a) by reference of the cause to a Master, after the office of Master in Chancery was constitutionally abolished; (b) by refusal of the trial court to

allow defendants to file a counterclaim; (c) by issuance of a decree that permanently enjoined defendants from instituting further litigation attacking the fee simple title to land which plaintiffs acquired in a condemnation proceeding. 2. Whether in a suit to enjoin vexatious and harassing litigation, Illinois law allows recovery of attorneys' fees and expenses as elements of damages.

After considering the arguments of the parties on the first issue, we conclude that reference of the cause to the Master was proper. He was in office when the suit was filed, when the constitutional amendment abolished Masters in Chancery and when, by appropriate orders, the reference was made. Therefore, he had the authority to hear the case. House of Vision, Inc. v. Hiyane, 37 Ill.2d 32, 36, 225 N.E.2d 21; compare People ex rel. Martoccio v. Atten, 42 Ill.2d 212, 246 N.E.2d 265.

Defendants could have filed the counterclaim with their answer, but when they asked leave to file it post-decree, it was for the trial court to decide whether leave should be granted. Bernat v. Hendrickson, 327 Ill. App. 332, 64 N.E. 235 (abstr.). The trial court had discretion to allow or deny filing of the counterclaim. Evaskus v. Neff, Kohlbusch and Bissell, Inc., 40 Ill.App.2d 416, 189 N.E.2d 542 (abstr.). This was particularly true when plaintiffs, in their objections, showed that defendants were seeking to relitigate issues barred by the doctrine of res judicata. See People v. Busenhart, 29 Ill. 2d 156, 195-60, 193 N.E.2d 850; Trustees of Schools of Tp. 42 North v. Schroeder, 2 Ill. App.3d 1009, 1015, 278 N.E.2d 431.

As to the injunction decree, defendants do not question the trial court's finding that they engaged in vexatious and harassing litigation with plaintiffs. It is well established that a court has inherent power to protect itself and litigants against vexatious and harassing litigation. People v. Circuit Court of Lake County, 31 Ill.2d 170, 173, 201 N.E.2d 109; Shatz v. Paul, 7 Ill.App.2d 223, 129 N.E.2d 348. It follows that neither reference of the cause to the Master, denial of leave to file the counterclaim nor entry of the permanent injunction decree deprived defendants of any constitutional right. House of Vision, Inc. v. Hiyane; supra; see Bowman v. Lake County Public Building Commission, 31 Ill.2d 575, 203 N.E.2d 129. We now turn to the issue concerning the judgment for damages.

Arguing their position on damages, plaintiffs first contend that defendants have not preserved the issue for review. The record, however, discloses that before answering plaintiffs' complaint, defendants made a motion to strike and dismiss. One of defendants' grounds was that the complaint did "(n)ot state a cause of action (because) there is no cause of action in the State of Illinois for various costs of suit, attorneys' fees or other expenses except as allowed by statute, or as provided by contract or agreement between the parties***." The motion was denied. This ruling preserved for review the issue whether in a suit to enjoin vexatious and harassing litigation, Illinois law allows recovery of attorneys' fees and expenses as elements of damages. See J. & R. Electric Co. v. Edward P. Allison Co., 125 Ill.App.2d 123, 260 N.E.2d

755. Therefore, we must reject plaintiffs' first contention.

Plaintiffs also contend that the award of damages was proper because under Illinois law compensatory damages can be recovered by a party injured by vexatious and harassing litigation. In support of this contention, plaintiffs cite American Optometric Ass'n v. Ritholz, 101 F.2d 883, 888 (7 Cir. 1939) where it was held that "(t)he facts of this case present a cause which, under the Illinois decisions, would entitle the plaintiff to recover damages for all injuries which are the proximate result of the malicious prosecutions instituted by the defendants in accordance with their unlawful conspiracy. One item of injury is the expense of attorneys' fees in defending the suits."

It can be readily seen that American Optometric Ass'n v. Ritholz is not in point. That case rested on a line of Illinois decisions which hold that a person who has been the victim of maliciously prosecuted suits, suits that constitute clear abuse of legal process, can recover damages. It does not support the proposition that in a suit to enjoin vexatious and harassing litigation, expenses, including attorneys' fees, can be recovered as elements of damages. This is so because under Illinois law, apart from sums allowable and taxed as costs, the expenses of trial preparation, of litigation or expenditures for counsel fees, cannot be recovered as damages. Chicago Coliseum Club v. Dempsey, 265 Ill.App. 542; Boss v. Coe Investment Co., 45 Ill.App.2d 417, 195 N.E. 2d 735; I.L.P. Damages, Section 62. The assessing of attorneys' fees against the losing party in a litigation rests wholly on statutory or contractual authority.

Ritter v. Ritter, 381 Ill. 549, 553, 46 N.E. 2d 41. In this State, there is no common law or equitable principle that allows attorneys' fees either as costs or as damages. People ex rel. Henderson v. Redfern, 104 Ill. App.2d 132, 243 N.E.2d 252; House of Vision, Inc. v. Hiyane, 42 Ill.2d 45, 245 N.E.2d 468. Therefore, because there is no statute or contract to support the recovery as damages of expenses and attorneys' fees in a case like this one, we are constrained to conclude that Illinois law does not authorize the judgment in favor of plaintiffs for $23,930 in attorneys' fees and $614.21 in expenses. It is one thing to enjoin defendants from pursuing vexatious and harassing litigation; it is another to impose on them a judgment for damages that will establish a legal precedent of far-reaching consequences.

For these reasons, the decree for injunction and the order denying leave to file a counterclaim are affirmed and the judgment for damages is reversed.

Affirmed in part; reversed in part.

Stamos, P.J. and Schwartz, J., Concur.

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
Springfield
62706

JUSTIN TAFT
Clerk

Telephone
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March 27, 1973

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No. 45568 - Trustees of Schools of Township 42 North, Range 11, East of the Third Principal Meridian, Cook County, Illinois, et al., etc., respondents, vs. Gerald A. Schroeder, et al., petitioners. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Justin Taft
Clerk of the Supreme Court.

No. 72-1739

AUG 31 1973

In the Supreme Court of the United States

OCTOBER TERM, 1973

GERALD A. SCHROEDER and CLARA JOHNSON SCHROEDER,

Petitioners,

vs.

TRUSTEES OF SCHOOLS OF TOWNSHIP 42 NORTH, RANGE 11, EAST OF THE THIRD PRINCIPAL MERIDIAN, COOK COUNTY, ILLINOIS, and BOARD OF EDUCATION, SCHOOL DISTRICT NO. 57, COOK COUNTY, ILLINOIS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, SECOND DIVISION

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INDEX

PAGE

Opinion Below 1

Questions Presented for Review 2

Statement of the Case 2

The Condemnation Action and The First Appeal .. 3

The Second Appeal 4

The 1962 Petitions and Motions And the Third Appeal 4

The "Conspiracy Case" and the Fourth Appeal .. 6

The First Federal Case and the Fifth Appeal 7

The Second Federal Case and the Sixth Appeal 7

The Instant Case and the Seventh Appeal 8

Argument 9

I. The Trial Court's Grant Of An Injunction Was Proper, As Was Its Refusal To Vacate Its Injunction To Permit The Schroeders To File Their "Counterclaim At Law" 9

II. No Federal Question Is Presented By The State Court Injunction Against Further State Court Suits 12

III. No Federally Protected Constitutional Right Was Violated By The Reference Of This Case To A Master In Chancery 13

Conclusion 14

TABLE OF AUTHORITIES

Cases

PAGE

Bailey v. Anderson, 326 U.S. 203, 206-07 (1945) 13, 14

Bowman v. Lake County Public Building Comm'n, 31 Ill.2d 575, 578-79 (1964) 11

City of Waukegan v. Stanczak, 6 Ill.2d 594, 605 (1955) .. 11

Clinton v. United States, 297 F.2d 899, 901 (9th Cir. 1961), cert. denied, 369 U.S. 856 (1962) 11

Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) 13

Herb v. Pitcairn, 324 U.S. 117, 125 (1945) 13

House of Vision, Inc. v. Hiyane, 37 Ill.2d 32, 36, 225 N.E.2d 21, 24 (1967) 13

Meredith v. John Deere Plow Co., 261 F.2d 121, 124 (8th Cir.) cert. denied, 359 U.S. 909 (1958) 11

Michel v. Louisiana, 350 U.S. 91, 99 (1955) 13

Patterson v. Northern Trust Co., 286 Ill. 564, 567 (1919) 10

People ex rel. Lake County Bar Assoc. v. Circuit Court of Lake County, 31 Ill.2d 170 (1964) 10

People ex rel. White v. Busenhart, 29 Ill.2d 156, 159-60 (1963) 9, 11

Schroeder v. Busenhardt, 80 Ill.App.2d 431, 438-39 (1st Dist. 1967) 9

Trustees of Schools v. Schroeder, 2 Ill.App.3d, 1009, 1015; 278 N.E.2d 431, 435 (1st Dist. 1971) 12

In the Supreme Court of the United States

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GERALD A. SCHROEDER and CLARA JOHNSON SCHROEDER,

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TRUSTEES OF SCHOOLS OF TOWNSHIP 42 NORTH, RANGE 11, EAST OF THE THIRD PRINCIPAL MERIDIAN, COOK COUNTY, ILLINOIS, and BOARD OF EDUCATION, SCHOOL DISTRICT NO. 57, COOK COUNTY. ILLINOIS,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To: *The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.*

Respondents submit this brief in opposition to the petition for certiorari.

OPINION BELOW

The opinion below of the Illinois Appellate Court is reported at 8 Ill.App. 3rd 122, and at 289 N.E.2d 247.

QUESTIONS PRESENTED FOR REVIEW

Were the Schroeders denied rights protected by the United States Constitution as a result of:

1. The granting by the trial court of an injunction restraining the Schroeders from filing further state court suits raising questions several times decided against them by Illinois appellate courts, or by

2. The reference in 1965 of this case to a Master in Chancery for hearings in accordance with procedures approved by the Supreme Court of the State of Illinois under the Constitution of the State of Illinois.

STATEMENT OF THE CASE.

This case is part of almost innumerable attempts petitioners have made since 1961 to relitigate various aspects of the school district's taking under the power of eminent domain of a certain parcel of land in Mount Prospect, Illinois, for use as a school site. The history of this litigation is reported in *Trustees of Schools* v. *Schroeder*, 23 Ill.2d 74 (1961); *Trustees of Schools* v. *Schroeder*, 25 Ill. 2d 289 (1962); *People ex rel. White* v. *Busenhart*, 29 Ill. 2d 156 (1963) (deciding consolidated appeals in two cases); *Schroeder* v. *Illinois*, 354 F.2d 561 (7th Cir. 1965), *cert. denied*, 384 U.S. 972 (1966); *Schroeder* v. *Busenhart*, 80 Ill.App.2d 431 (1st Dist. 1967), *cert. denied*, 390 U.S. 947 (1968); *Schroeder* v. *Busenhart*, 272 N.E.2d 750 (Ill. 1st Dist. 1971), *cert. denied*, 405 U.S. 1017 (1972); and in the opinion below, *Trustees of Schools* v. *Schroeder*, 8 Ill.App.3rd 122, 289 N.E.2d 247 (1st Dist. 1972). The following is a summary of that history.

The Condemnation Action And The First Appeal

In November, 1959, the Respondent Trustees of Schools filed an action seeking to condemn certain real estate then owned by the Schroeders in Cook County, Illinois. The Schroeders filed a traverse to the petition to condemn, which was denied. After a trial on the question of just compensation, a jury returned a verdict for $267,083.33. On October 27, 1960, a judgment order was entered by the Circuit Court of Cook County on that verdict, awarding the sum returned as just compensation, together with interest from the date of the verdict until the date of the judgment, for the taking of the real estate.

The Trustees of Schools filed a post-trial motion asking for a new trial, which was granted. The Schroeders appealed to the Illinois Supreme Court from the order granting a new trial, and the order was reversed "with directions to vacate the order granting a new trial and to enter judgment upon the verdict for $267,083.33." This opinion of the Illinois Supreme Court, dated September 22, 1961, appears at 23 Ill. 2d 74.

On October 18, 1961, the Circuit Court, pursuant to the Illinois Supreme Court's mandate, entered a judgment order vacating the order granting a new trial, and providing that upon payment of $267,083.33, plus interest, the Trustees of Schools would be vested with fee simple title to the real estate. On October 23, 1961, the Circuit Court entered an order finding that the amount ($280,956.10) required by the judgment order has been paid, and further found that fee simple title to the property was vested in the Trustees of Schools. (See 29 Ill. 2d at 158.)

The Second Appeal

On November 6, 1961, the Schroeders filed a notice of appeal to the Illinois Supreme Court from an order entered in 1960 denying their traverse, from an order denying a motion to vacate the order denying the traverse, from the judgment order of October 18, 1961 entering judgment on the jury's verdict in the sum of $267,083.33, and from an order of October 23, 1961 granting possession of the real estate to the Trustees of Schools. On May 25, 1962 (rehearing denied on September 27, 1962), the Illinois Supreme Court affirmed the above recited orders of the Circuit Court in an opinion published at 25 Ill.2d at 289.

By reason of the judgment order entered on October 18, 1961, the order for possession entered on October 23, 1961, and the affirmance of these orders by the Illinois Supreme Court, the rights of the parties with respect to the title to the property acquired by the Trustees of Schools under the power of eminent domain, and the right to possession of the property, became and have ever since been fully adjudicated, and any right which the Schroeders had to said property prior to these orders terminated. (*People ex rel. White* v. *Busenhart*, 29 Ill.2d 156, 165 (1963).)

The 1962 Petitions And Motions And The Third Appeal

Over the Labor Day week-end in 1962, the Schroeders, in violation of the order for possession entered on October 23, 1961, retook possession of the real estate. On September 4, 1962, the Trustees of Schools filed a petition for a Supplemental Writ for Possession to remove the Schroeders from the real estate. (See 29 Ill.2d at 158.) While the Supplemental Writ for Possession was pending in the Circuit Court, the Schroeders filed a petition in the Illinois Supreme Court seeking to amend the Petition for Rehearing previously filed in the case culminating at 25 Ill. 2d 289. This Petition was denied on September 12,

1962, and on September 27, 1962 the Illinois Supreme Court denied rehearing in the Second Appeal.

The Schroeders also filed in the condemnation case in the Circuit Court a "Cross-Petition And Counterclaim" to the Petition for Supplemental Writ for Possession in which the Schroeders charged that the Trustees of Schools had abandoned their Petition to Condemn. On September 25, 1962, the Schroeders filed another petition in the condemnation case in the Circuit Court, charging that the Court had no authority to evict them from the premises and no authority to vest the Trustees of Schools with fee simple title. (See 29 Ill.2d at 158-59.)

Meanwhile, on September 13, 1962, the Schroeders, together with several other persons alleged to be taxpayers in the school district, filed a petition for leave to file a taxpayers' complaint for injunction, with a proposed complaint attached. The proposed complaint sought to enjoin the School Board from paying out public funds for the construction of the school, alleging, *inter alia*, that the Trustees of Schools did not own the real estate because of various alleged defects in the condemnation proceeding. The Circuit Court denied leave to file the taxpayers' injunction complaint on the ground that it was insufficient in law, and because it amounted to a collateral attack on the decree entered, appealed and affirmed in the condemnation case. (See 29 Ill.2d at 160-62.)

The Circuit Court also denied the various motions and petitions filed by the Schroeders in the condemnation case in 1962 after the Schroeders' unlawful re-entry on to the real estate.

The Schroeders appealed from the denial of leave to file a taxpayers' complaint, and from the denial of their various motions and petitions filed in the condemnation

case. These appeals were consolidated by the Illinois Supreme Court.

In an opinion filed on September 27, 1963 (rehearing denied November 25, 1963), published at 29 Ill. 2d 156, the Illinois Supreme Court affirmed the orders of the Circuit Court, both in the taxpayers' injunction suit and in the condemnation case. The Court stated (p. 159) that all the points raised by the Schroeders in the condemnation case in their petitions and motions filed after the 1962 Labor Day week-end were either conclusively adjudicated against the Schroeders or could have been raised in the second appeal and were, therefore, barred. (29 Ill. 2d at 158.) The Court stated with reference to the taxpayers' injunction suit, that the petitioners therein sought to raise "the points urged in the eminent domain case." (*Id.* at 162.) The Court further stated (*ibid.*):

> "They go so far as to allege unequivocally that title was vested in the Schroeders despite the records of the court showing the judgment which we affirmed in the second Appeal. (25 Ill. 2d 289.) That judgment is not subject to collateral attack since the Court had jurisdiction of the subject matter and the parties. . . . Consequently, these points were improperly pleaded inasmuch as they constitute a collateral attack upon the judgment of the court vesting title in the School Trustees."

The "Conspiracy Case" And The Fourth Appeal

In late 1963, the Schroeders filed another suit in the Circuit Court of Cook County against the Trustees of Schools, the Board of Education, and various firms and individuals who had been hired in connection with the construction of a school on the condemned property. The Schroeders' Complaint charged that all of the defendants had conspired to put plaintiffs out of the fruit and vegetable business they had conducted on the property taken

in the condemnation proceeding. The Schroeders further alleged in that complaint that they, and not the Trustees of Schools, were the rightful owners of the real estate upon which the school was being constructed. Summary judgment was granted for the defendants in that case, and that judgment was affirmed by the Illinois Appellate Court in an opinion reported at 80 Ill. App. 2d 431 (1967). Leave to appeal was denied by the Illinois Supreme Court, and certiorari was denied by this Court. 36 Ill. 2d 632 (1967), *cert. denied* 390 U.S. 947 (1968).

The First Federal Case And The Fifth Appeal

Next, on January 20, 1964, while the "conspiracy" case was still pending in the Circuit Court, the Schroeders filed an action in the United States District Court for the Northern District of Illinois claiming that the condemnation proceeding had violated their civil rights and deprived them of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. Among the defendants named in that case were the Trustees of Schools, the Board of Education and the State of Illinois. In this federal action, the Schroeders sought to cause all the proceedings, judgments and orders of the Courts of the State of Illinois relating to the real estate declared null and void. The Federal District Court on October 29, 1964 dismissed that complaint, and that order was affirmed by the Court of Appeals for the 7th Circuit in *Schroeder v. State of Illinois, et al.*, 354 F.2d 561 (1965), *cert. denied*, 384 U.S. 972 (1966).

The Second Federal Case And The Sixth Appeal

In 1967, the Schroeders filed another action in the Federal Court, again raising the allegation that they, and not the Trustees of Schools, were the rightful owners of the fee to the property condemned in 1959. That com-

plaint was likewise dismissed by the District Court, and the Schroeders' appeal from that order was dismissed by the Court of Appeals on August 28, 1968 because of the Schroeders' failure to file a brief. (*Schroeder v. Murphy, et al.*, Nos. 16730 and 16731.)

The Instant Case And The Seventh Appeal

After the instant complaint was filed by the Trustees of Schools and the Board of Education in November, 1964, the trial court entered an order referring the cause to a Master in Chancery. After hearing evidence, the Master recommended that a decree for injunction be granted, and on July 30, 1968 the trial court entered a decree for injunction restraining the Schroeders from filing further actions in Illinois state courts to affect the Trustees of Schools' title to the real estate.

The Complaint filed by the Trustees of Schools also requested money damages, and hearings on the question of damages began before the Master in January, 1969. While they were in process, the Schroeders filed a motion to vacate the Decree of Injunction and requested leave to file a "Counterclaim at Law", a copy of which was attached to the motion. The "Counterclaim at Law" stated that the petition of condemnation filed by the Trustees of Schools in 1959 was "*void ab initio*," and requested an order voiding the October 27, 1960 order because the Circuit Court did not have jurisdiction to award a fee simple title to the Trustees of Schools. The Schroeders were denied leave to file their proposed Counterclaim.

In August, 1969, the Master recommended the award of damages to the Trustees of Schools, and the trial court entered judgment for $24,544.21. The Schroeders appealed, and the Illinois Appellate Court affirmed the decree for injunction and the order denying leave to file a Counterclaim, but reversed the judgment for damages.

ARGUMENT

I.

THE TRIAL COURT'S GRANT OF AN INJUNCTION WAS PROPER, AS WAS ITS REFUSAL TO VACATE ITS INJUNCTION TO PERMIT THE SCHROEDERS TO FILE THEIR "COUNTERCLAIM AT LAW."

The injunction entered by the trial court enjoined the Schroeders "from instituting or prosecuting any proceedings . . . for the purpose of causing the vacation or in any manner affecting the verdict and judgment . . . entered in [the 1959 condemnation case], or any proceedings ancillary or supplemental thereto affecting title in the premises described in said condemnation action in plaintiff, . . ." As both the Illinois Supreme Court and the Illinois Appellate Court have had occasion to note, the rights of the parties with respect to the title and right of possession to the condemned property has been fully adjudicated since May 25, 1962. See *People ex rel. White* v. *Busenhart*, 29 Ill.2d 156, 159-60 (1963); *Schroeder* v. *Busenhardt*, 80 Ill.App.2d 431, 438-39 (1st Dist. 1967). Nevertheless, in this very case the Schroeders wanted the trial court to lift its injunction against further attacks on the school authorities' title so that they could file a "Counterclaim at Law" which alleged that they were the owners of fee simple absolute title in the property, and that the judgments of the Illinois courts to the contrary were "void *ab initio.*"

The most cursory review of the tortured history of this litigation demonstrates that nothing less than an injunction like that issued will deter the Schroeders from their seemingly endless course of vexatious litigation.

In effect, the Schroeders' argument is that even though they have prosecuted four or five separate suits in an attempt to avoid the judgment entered in the 1959 condemnation action, they should not be enjoined from filing further suits. The courts, however, have some interest in forestalling the monumental waste of judicial time which would be required to hear further assaults by the Schroeders upon the judgment in the 1959 condemnation case. See *Patterson* v. *Northern Trust Co.*, 286 Ill. 564, 567 (1919). It is settled in Illinois and elsewhere that a court of equity has jurisdiction to enjoin the maintenance of vexatious or harassing litigation, and that the plea of *res judicata* is not an adequate remedy for a party who is subject to such litigation. In *People ex rel. Lake County Bar Assoc.* v. *Circuit Court of Lake County*, 31 Ill.2d 170 (1964), the Illinois Supreme Court had before it a petition for leave to file an original action for a Writ of Prohibition to enjoin successive law suits challenging the right of Lake County to issue and sell bonds for the construction of a courthouse, a right which the Illinois Supreme Court had upheld in a prior appeal. Although the Supreme Court held that a Writ of Prohibition should not issue from that Court, it pointed out that an injunction by the trial court was an appropriate remedy (31 Ill.2d at 173-74):

> "While we have thus concluded that the writ of prohibition should not issue, it does not follow that petitioners are without adequate remedy. The jurisdiction of a court of equity to restrain the maintenance of vexatious or harassing litigation is well established, [citations omitted] and we have concluded that that is the appropriate remedy in the present case. In view of the serious financial injury and inconvenience to the public that could result from successive lawsuits, apparently designed to prevent the issuance and sale of the proposed revenue bonds, we

> have considered the advisability of issuing the injunction of this court to restrain the prosecution of the pending case and the institution of further litigation. We have concluded, however, that the matter may more appropriately be dealt with in the circuit court, either by a counterclaim for injunction in the pending case or by an independent action for injunction."

Thereafter a counterclaim for injunction was interposed in the pending action. The trial court granted the injunction requested in the counterclaim, and enjoined plaintiffs "from the institution of vexatious or harassing litigation of any issue raised and decided, or governed in principle by the" plaintiffs' first appeal. The Illinois Supreme Court affirmed in *Bowman* v. *Lake County Public Building Comm'n*, 31 Ill.2d 575, 578-79 (1964). *Accord, Clinton* v. *United States*, 297 F.2d 899, 901 (9th Cir. 1961), *cert. denied*, 369 U.S. 856 (1962); *Meredith* v. *John Deere Plow Co.*, 261 F.2d 121, 124 (8th Cir.) *cert. denied*, 359 U.S. 909 (1958).

The assumption underlying all of the Schroeders' litigation is the assertion that the Circuit Court of Cook County had no jurisdiction to award a fee simple title to the school authorities in the condemnation action filed in 1959. The Schroeders remain undaunted by the fact that this point has long since been resolved by their failure to raise it in the "second appeal" (see *People ex rel. White* v. *Busenhart*, 29 Ill.2d 156, 159-60 (1963), or by the fact that Illinois law is clear to the effect that a school district may acquire a fee title (see *City of Waukegan* v. *Stanczak*, 6 Ill.2d 594, 605 (1955).) In fact, the Illinois Appellate Court has specifically held, in another one of the Schroeders' various litigations, that the Circuit Court of Cook County had authority to grant fee simple title in the prop-

erty in question to the school authorities. In *Trustees of Schools* v. *Schroeder*, 2 Ill.App.3d, 1009, 1015; 278 N.E.2d 431, 435 (1st Dist. 1971), the court stated:

> "We believe that the position of our Supreme Court is clear and that the Trustees of Schools were fully empowered by par. 7-17 to take a fee simple absolute estate in the Schroeders' property."*

The fact that the Schroeders continue to urge that the Circuit Court of Cook County had no jurisdiction to award fee simple title, notwithstanding numerous appellate pronouncements to the contrary, speaks eloquently of the necessity for an injunction.

II.

NO FEDERAL QUESTION IS PRESENTED BY THE STATE COURT INJUNCTION AGAINST FURTHER STATE COURT SUITS.

The injunction complained of in the instant matter is an injunction prohibiting the Schroeders from filing further challenges to the school authorities' title in Illinois state courts. The injunction specifically excludes from its scope federal court litigation:

> "[T]he within injunction against [The Schroeders] shall not affect any litigation in courts of the United States of America."

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* This case was between the Schroeders and the attorneys who represented them in the 1959 condemnation case. The Schroeders claimed that their attorneys were guilty of malpractice in having failed to argue in the second appeal that the Circuit Court lacked jurisdiction to award a fee title to the school authorities. In order to sustain the summary dismissal of this claim, it was necessary for the court to conclude that, as a matter of law, the Schroeders' position was without merit.

The closing of the doors of the Illinois courts to the Schroeders on the limited question of the title to this parcel of real estate after almost fifteen years of litigation does not present any Federal Constitutional issue. See *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935).

III.

NO FEDERALLY PROTECTED CONSTITUTIONAL RIGHT WAS VIOLATED BY THE REFERENCE OF THIS CASE TO A MASTER IN CHANCERY.

As the court below noted (8 Ill. App. 3rd at 124, 289 N.E.2d at 249), the reference of this case to a master in chancery was proper under the Illinois Constitution because the master was in office when the suit was filed and when the trial court by appropriate order made the reference. The Illinois Supreme Court in 1967 determined the propriety of references to masters under those circumstances. *House of Vision, Inc.* v. *Hiyane*, 37 Ill.2d 32, 36, 225 N.E.2d 21, 24 (1967).

Although the Schroeders argued below that the reference of this case to a master violated rights secured by the Illinois Constitution, they never suggested that any federally protected right was violated. The Schroeders filed three briefs in the Illinois Appellate Court (an appellant's brief, a reply brief, and, after they changed counsel, a "supplemental" brief). They also filed in the Illinois Supreme Court a petition for leave to appeal from the decision of the Illinois Appellate Court. None of these four briefs raised any federal constitutional question. They clearly are not entitled to raise such a new ground in a petition for certiorari to this Court. *Michel* v. *Louisiana*, 350 U.S. 91, 99 (1955); *Bailey* v. *Anderson*, 326 U.S. 203, 206-07 (1945).

In any event, it is clear that no federal constitutional question is presented by the Illinois procedural rules followed in the instant case. See *Bailey* v. *Anderson*, 326 U.S. 203, 205 (1945). Even the Schroeder's Petition for Certiorari to this Court does not suggest how any federally protected right has been violated.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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